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No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, APPELLANT

v.

UNIVERSAL C.I.T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The memorandum opinion of the District Court (R. 10-19), as modified by later order of the court (R. 20), dismissing certain counts of the information, is reported at 102 F. Supp. 179.[1]

JURISDICTION

The order of the District Court dismissing the counts of the information was entered on January

[1] One of the two modifications ordered by the court does not appear in the reported opinion; the amount "$270,000" at 102 F. Supp. 186 should read "$320,000" (R. 20).

15, 1952 (R. 10-19), and the order modifying the above order and denying the Government's motion for rehearing was entered on March 10, 1952 (R. 20). The United States filed its notice of appeal to this Court on April 7, 1952 (R. 22-23). Probable jurisdiction was noted by this Court on May 26, 1952 (R. 25). The jurisdiction of this Court to review on direct appeal the order of the District Court dismissing an information, where such dismissal is based on the construction of the statute on which the information is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), F. R. Crim. P. The following decisions sustain the jurisdiction of this Court: *United States* v. *Rosenwasser*, 323 U.S. 360, 361; *United States* v. *Foster*, 233 U.S. 515, 522-523.

QUESTION PRESENTED

In a 32-count information the Government charged violations of the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act, separating the counts on the basis of (a) the section of the Act alleged to have been violated, (b) the particular defendants involved, (c) the particular employee involved, and (d) the particular workweek involved. The District Court dismissed all but three counts, one for each section of the Act alleged to have been violated, and ordered the other counts to be treated as stating overt acts with respect to these three surviving counts.

The question presented is whether the specific

individual acts were properly pleaded as separate offenses or whether it was mandatory to treat them as parts of continuing offenses.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910),[2] are:

Section 6 (29 U.S.C. 206 and 29 U.S.C., Supp. V, 206):

> (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than 75 cents an hour;

Section 7 (29 U.S.C., Supp. V, 207):

> (a) * * * no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11(c) (29 U.S.C. 211(c)):

> Every employer subject to any provision of this Act or of any order issued under this Act

[2] The only change made by the 1949 amendments which is material here was the increase of the minimum wage from 40 cents per hour to 75 cents per hour.

shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (29 U.S.C. 215):

(a) * * * it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisons of section 6 or section 7, * * *

* * * * *

(5) to violate any of the provisons of section 11(c), * * * or to make any statement, report, or record filed or kept pursuant to the provisons of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 16(a) (29 U.S.C. 216 (a)):

Any person who willfully violates any of the provisons of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such

person for a prior offense under this subsection.

STATEMENT

On July 30, 1951, an information containing 32 counts, charging defendants with violations of the Fair Labor Standards Act, was filed in the United States District Court for the Western District of Missouri. Counts I-III charged defendants Universal C. I. T., and two of its officers, Neal and Conklin, with having wilfully failed to pay wages at the rate of the statutory minimum rate of seventy-five cents an hour to an employee named Way for the workweek ending May 26, 1950 (Count I; R. 1), and to another employee, Kellerman, for the workweek ending May 13, 1950 (Count II; R. 1) and the workweek ending May 20, 1950 (Count III; R. 2).

Counts IV-VI charged defendants Universal C. I. T., Neal, and an officer named Wolfe with having wilfully failed to pay wages at the rate of not less than seventy-five cents an hour to Way for the workweek ending October 7, 1950 (Count IV; R. 2), and to another employee, Smith, for the workweek ending October 14, 1950 (Count V; R. 2) and the workweek ending December 9, 1950 (Count VI; R. 2).

Each of counts VII-XVII (R. 2-4) charged defendants Universal C. I. T., Neal, and Conklin with having wilfully employed specified employees for specified workweeks longer than 40 hours without paying the statutory overtime compensation for work in excess of 40 hours at the rate of one and

one-half times the regular rate. The 11 alleged offenses were scattered over a period of one and one-half years from December of 1948 through May of 1950, and involved six different employees not involved in any of the other offenses alleged in the information. No two of the alleged offenses occurred during any one workweek or, with one exception, within the same month.[3] In no case did two offenses as to the same employee occur in successive workweeks.

Each of counts XVIII-XXVI (R. 4-6) charged defendants Universal C. I. T., Neal, and Wolfe with having wilfully employed specified employees for specified workweeks longer than forty hours without paying the statutory overtime compensation for work in excess of 40 hours at the rate of one and one-half times the regular rate. The nine alleged offenses were scattered through a period of half a year from July to December 1950, and involved five different employees not involved in any of the other offenses alleged in the information. No two of the alleged offenses occurred during any one workweek and only in one case were offenses alleged in successive workweeks as to the same employee (Counts XXV-XXVI; R. 6).

Counts XXVII and XXVIII (R. 6-7) charged defendants Universal C. I. T., Neal, and Conklin with having wilfully falsified the work records, respectively, of two specified employees for the pe-

[3] The only *successive* weeks for which failure to pay overtime was alleged were the weeks ending February 4 and 11, 1950. Different employees were involved in these two weeks (Counts XIII and XIV; R. 4).

riod April 10 through May 27, 1950. Counts XXIX-XXXII (R. 7-8) charged defendants Universal C. I. T., Neal, and Wolfe with having wilfully falsified the work records, respectively, of the same two employees for the period June 5 through December 16, 1950, and of another employee for the period July 3 through December 30, 1950.

Defendants moved to dismiss the information on the ground, *inter alia*, that it contained a multiplicity of counts, and that all the charges in counts XXVII-XXXII were parts of the offense charged in count XXVII (R. 8-10). The district judge, interpreting defendant's motion as also attacking the charging of separate offenses as to each employee, was of the opinion that the Act prohibited only courses of conduct, not individual acts. He held that only one offense could be charged for each type of violation of the statute, regardless of the number of "overt acts" which had been committed in violation of the requirements of the statute. (R. 13-19.) Accordingly, all minimum wage counts except the first were dismissed, and a similar disposition was made with respect to the overtime and falsification counts. The district judge dismissed all counts of the information except counts I, VII, and XXVII and ordered that the allegations of counts VI, XVIII, and XXIX, in which defendant Wolfe was charged, be considered as charging Wolfe in connection with counts I, VII, and XXVII.[4] (R. 19.)

[4] The designation of specific employees and workweeks were ordered to be considered as charges of "overt" acts with respect to the counts retained.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that, under Section 15 of the Fair Labor Standards Act, the offenses of failing to pay minimum wages, of employing for a workweek longer than 40 hours without paying overtime rates, and of falsifying records were continuous offenses relating to a course of conduct, with the result that only one offense could be charged for each type of violation, regardless of the number of separate workweeks and separate employees involved.

2. In holding that failure to pay minimum wages and the employment of employees for a workweek of more than 40 hours without paying overtime rates did not constitute a separate offense as to each employee and each workweek under Section 15 of the Fair Labor Standards Act.

3. In holding that falsifications of the work records of different employees did not constitute separate offenses.

4. In dismissing counts II-VI, VIII-XXVI and XXVIII-XXXII of the information.

SUMMARY OF ARGUMENT

Throughout the fourteen years since the enactment of the Fair Labor Standards Act, a violation by an employer of a particular duty as to an individual employee for a separate workweek has been regarded as a separate offense, and as properly alleged in a separate count in an indictment or in-

formation.[5] Since objection has not previously been raised to this practice, its validity has not been specifically passed upon by the courts. However, both in this Court and in the courts of appeals where multiple-count indictments or informations have been involved in cases under review, no judicial objection has been noted. Of innumerable district court cases, this is the first in which an indictment or information has been held vulnerable in this respect. It is submitted that the holding that there can be only one offense for each type of violation, regardless of the length of time, intermittent character, differences in defendants, or number of employees involved, misconceives the structure and language of the Act.

A. The whole structure of the Fair Labor Standards Act shows that it is based on the individual employee in relation to the individual period of his employment. The coverage of the Act depends upon the occupation of the particular employee

[5] In practice there have been exceptions to this method of pleading, particularly with respect to charges of falsifying or failing to keep records, when it has sometimes proved more convenient to combine a series of similar acts or omissions in one count. This type of pleading was followed in Counts XXVII to XXXII of the information in this case where falsifications of groups of records were charged in separate counts. If the charges are sufficiently definite to inform the accused of the nature of the offenses charged, he is not prejudiced by this practice, and may be favored since, if found guilty, he may be given but one penalty for several offenses. *Cf. Crain v. United States*, 162 U. S. 625; *Mellor v. United States*, 169 F. 2d 757, 762 (C. A. 8), certiorari denied, 331 U. S. 848. It is submitted that the position taken in the present appeal, that the government is not required to plead related violations in a single count, is not inconsistent with permitting the government so to plead when it does not prejudice the accused.

rather than upon the nature of the employer's business. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132. The duty imposed on the employer by Section 6 is to pay "to each of his employees who is engaged in commerce or in the production of goods for commerce" the minimum hourly rate. The duty imposed by Section 7 is to refrain from employing "any of his employees" who is engaged in commerce or production of goods for commerce for more than 40 hours a "workweek" unless "such employee" receives additional compensation. The obligation imposed by Sections 11(c) and 15(a)(5) is to maintain each of the records prescribed by the Administrator and not to falsify any one of them. And when, in Section 16(a), the statute imposes a penalty on any person who wilfully violates "any of the provisions of section 15," it must be construed to punish each failure to comply with each duty imposed by the Act as to each employee in each workweek and as to each record required to be kept.

The theory of the District Court that the Act punishes, as a single continuous act, non-compliance with the prescribed duties "while engaging in interstate commerce, or the production of goods for commerce" is further refuted by the fact that subsection (1) of 15(a) specifically creates the separate offense of shipping in interstate commerce goods produced under conditions which violated the Act. The ultimate act of engaging in interstate commerce with goods produced under substandard conditions is thus only one of the offenses created

by Section 15(a). Section 15(a)(2) also makes it unlawful to violate "any" of the provisions relating to rates and hours, and records. Thus the Act punishes not solely the ultimate result of engaging in commerce, but the violation of the specific duties which, as noted above, run to each individual employee.

This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. The offenses may not be repeated from week to week. Different employees, new or old, may be involved. The decision as to each employee is necessarily a new decision involving different factors as to hours and rates. As to the records, each new false entry requires a new impulse.

B. The conclusion that the statute punishes individual acts rather than a course of conduct is buttressed by consideration of the language of the statute in the light of the standards which have been applied in determining whether criminal offenses are separate or continuing. An analysis of the cases on the problem establishes that the basic test to be employed in determining whether offenses are separate is to ascertain whether the several offenses charged are distinguished from one another by criteria employed in the statute, as distinguished from criteria created solely by the prosecution. If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many, he is enabled to render a crime

infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty. But if, as here, the statute itself furnishes the basis for the delimitation of the offense, there can be no splitting of the offense into increasingly smaller units and the statutory penalty, correspondingly, cannot be exceeded.

This point is illustrated by comparing *In re Snow*, 120 U.S. 274, in which this Court held that the offense of cohabitation could not be divided into three separate offenses relating to separate years, with *Ebeling* v. *Morgan*, 237 U.S. 625, where the cutting of six mail bags at one time was held to constitute six different offenses. In the *Snow* case, the statute provided no yearly or other time criteria for delimiting the offense; in the *Ebeling* case, Congress had fixed the unit of the offense as "any mail bag."

With respect to many different types of statutes, this Court and the lower federal courts have consistently held that, where the statutory language suggests a unit delimitation of the offense, a violation as to each unit is a separate offense, e.g. *Blockburger* v. *United States*, 284 U.S. 299 (each sale of narcotics even to the same buyer is a separate offense); *In re Henry*, 123 U.S. 372 (under the mail fraud statute, each mailing is a separate offense although in furtherance of the same scheme); *Bery* v. *United States*, 176 F. 2d 122, 125-126 (C.A. 9), certiorari denied, 338 U.S. 876 (sepa-

rate false entries as to different transactions are separate offenses).

The Fair Labor Standards Act is precise in stating the criteria for determining the offenses relating to overtime and records. As to overtime, the duty is to refrain from employing any person more than 40 hours a week unless overtime compensation is paid. Thus the act of working an employee more than 40 hours in any workweek without paying overtime at the rate prescribed constitutes a separate violation. Similarly, as to false records, the duty is to refrain from falsifying any record required to be kept. Since the Administrator requires records for each employee, for each workweek, the making of false entries as to each employee for each workweek is obviously a separate violation. As to the seventy-five-cent-an-hour minimum wage, the Act is clear that the duty extends to each employee. Since the unit of time to be used in determining whether the statutory rate has been met is not specifically set forth in Section 6, and the unit of the workweek is used elsewhere in the Act, the Administrator and the courts have accepted that time unit to determine violations of that section. Possibly, on the basis of the language of the Act, the "workhour" rather than the "workweek" could be used, but certainly defendants are not prejudiced by the use of the longer period since it decreases the number of offenses which may be charged.

Thus, the Government, in framing its counts upon the basis of separate employees, workweeks,

and records is not creating criteria or divisions of its own; it is employing the unit fixed by the statute itself. The language of the Fair Labor Standards Act does not restrict the penalty to a course of engaging in an unlimited number of such offenses. The prosecution has alleged the offenses in the terms in which the Act defines them.

ARGUMENT

The Fair Labor Standards Act Has Properly Been Construed as Providing for Separate, Rather Than Continuing, Offenses

The Fair Labor Standards Act imposes a duty upon the employer to pay "each" of his employees at a rate of not less than 75 cents "an hour" (Sec. 6) and to refrain from employing "any" of his employees for a "workweek" longer than forty hours unless overtime is paid (Sec. 7). Section 15 (a) makes it unlawful to violate "any" of the provisions of Section 6 or Section 7 or knowingly to make "any" false "statement, report, or record." Section 16(a) imposes punishment upon any person who wilfully violates "any" of the provisions of Section 15.

The decision of the court below reverses 14 years of administrative practice, acquiesced in by this Court, the courts of appeals, and the district courts. Ever since the passage of the Fair Labor Standards Act, the administrative agency charged with its administration has interpreted it as providing that each failure to comply with the Act with respect to each individual employee for each work-

week constitutes a separate offense. It is estimated that 1400 informations and indictments have been framed on the basis of that interpretation.[6] This Court has never been called upon to pass specifically on this practice, but in various cases in which the constitutionality and interpretation of the Act have been at issue, the use of separate counts as employed here was of record. Thus, in *United States* v. *Darby Lumber Co.*, 312 U. S. 100, the indictment, filed in 1939, consisted of: three counts charging minimum wage violations with respect to three employees for one workweek each; eight counts charging overtime violations with respect to eight employees for one workweek each; one count charging failure to keep records for the period October 24, 1938, to September 15, 1939; five counts charging separate shipments in interstate commerce of goods produced for the defendant in violation of the minimum wage provisions; one count charging a shipment produced for the defendant in violation of the overtime provisions; and one count charging a shipment produced by employees of the defendant who were paid less than minimum wages (R. 3-14, No. 82, O.T. 1940). In *United States* v. *Rosenwasser*, 323 U. S. 360, five counts charged falsification of records of five employees

[6] See lists of criminal proceedings reported in the News Sections of the Labor Relations Reporter, Bureau of National Affairs, in various issues from January 1947 through August 1951. A survey of the records maintained by the Office of the Solicitor, United States Department of Labor, indicates that approximately 1400 cases with pleadings similar to those in the present case have been commenced.

for specific workweeks; one count charged violation of the minimum wage provision of an employee for one workweek; six counts charged overtime violations in the case of six employees for six separate workweeks; and three counts charged shipments in interstate commerce produced in violation of the minimum wage and hour time provisions (R. 2-16, No. 106, O. T. 1944). Similarly, no objection has been raised by the courts of appeals in the circuits where criminal proceedings under the Fair Labor Standards Act have been reviewed. *United States* v. *Berger*, 145 F. 2d 888 (C. A. 2), certiorari denied, 324 U. S. 848; *United States* v. *Darby Lumber Co.*, 132 F. 2d 928 (C. A. 5);[7] *Hertz Drivurself Stations, Inc.* v. *United States*, 150 F. 2d 923 (C. A. 8); *Nabob Oil Company* v. *United States*, 190 F. 2d 478 (C. A. 10), certiorari denied, 342 U. S. 876. And in innumerable district court cases informations and indictments charging multiple offenses have been upheld or have been the basis of convictions. See, e. g., *United States* v. *Ewald Iron Co., Inc.*, 67 F. Supp. 67 (W. D. Ky.); *United States* v. *General Ribbon Mills, Inc.*, 47 F. Supp. 801 (E. D. Pa.). In short, this is the first instance in which any court has held that it is mandatory to plead the separate acts or omissions as parts of continuing offenses.

It is the position of the Government that the construction which has been adopted from the time

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[7] The *Darby* case was tried on the merits after this Court upheld the constitutionality of the Act, and Darby's conviction was then appealed to the Court of Appeals.

of the enactment of the statute is the correct one, and that the language of the statute, read in light of the principles which have been laid down by this Court for the determination of the character of criminal offenses, clearly indicates that each count of the information properly charged a separate offense.

A. *The Structure of the Statute Leads to the Construction that Each Prohibited Act or Omission Constitutes a Separate Offense*

The gist of the District Court's opinion (R. 16) is that the Act

> can only be construed as meaning that each employer engaged in such commerce must conform to the above wage and hour standard of the Act with respect to every one of his employees, and if he does not do so, then a singular offense is committed in violation of the Act, irrespective of the number of employees involved, and regardless of the period of time over which such action continues. The offense so committed is not divisible by the number of employees as to whose employment the employer fails to comply with the wage and hour provisions of the Act. Failure to comply as to one or all of such employees produces a single result, the violation of a "prohibited act."

The reasoning misconceives the structure of the Fair Labor Standards Act which is based on the individual employee with respect to the individual workweek. Thus the coverage of the Act depends

upon the occupation of the particular employee in relation to interstate commerce rather than upon the nature of the employer's business. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, 132, and cases cited. The duty imposed on the employer by Section 6 is to pay "to each of his employees who is engaged in commerce or in the production of goods for commerce" the minimum hourly rate. The duty imposed by Section 7 is to refrain from employing "any of his employees" who is engaged in commerce or production of goods for commerce for more than a fixed number of hours per workweek unless "such employee" receives additional compensation.[8] Section 516.2 of the Regulations adopted pursuant to Section 11(c) of the Act requires the employer to maintain a record for each employee showing the number of hours worked each workweek and the amount of compensation paid.[9] Thus, as to each individual employee there

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[8] The workweek has been defined in the Regulations (29 C.F.R. 778.2(c)) as a fixed and regularly recurring period of 168 hours in seven consecutive 24-hour periods, which need not coincide with the calendar week, but may be begun on any day and at any hour of the day. Once the beginning time of an employee's workweek is established it remains fixed regardless of the schedule of the hours worked by him. This position has been upheld in the courts. *Harned* v. *Atlas Powder Co.*, 301 Ky. 517, 192 S. W. 2d 378; *Barclay* v. *Magnolia Petroleum Co.*, 13 Lab. Cas. CCH Par. 64,017 (Texas Civ. App.), 203 S. W. 2d 626.

[9] 29 C.F.R. 516.2 provides in pertinent part as follows (underlining added):

> *Employees subject to minimum wage and 40-hour week overtime provisions; sections 6 and 7 (a) of the act—*
>
> (a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the

is an independent duty to pay the prescribed rates, to refrain from employment of more than 40 hours unless overtime is paid, and the concomitant duty to keep the records required under Section 11. Hence, by Section 15, declaring it unlawful to violate "any" of the provisions of Sections 6 or 7 or to make "any * * * record" under Section 11 knowing it to be materially false, the statute prohibits any violation as to any employee with respect to any of these duties. Therefore, when Section 16(a) imposes a penalty on any person who wilfully violates "any of the provisions of section 15," it punishes each failure to comply with each duty imposed by the Act as to each employee in each workweek. Significantly, the civil liability imposed by Section 16(b) for violations of Sec-

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following information and data with respect to each and every employee to whom both sections 6 and 7 (a) of the act apply:

(1) Name in full * * *

* * * * *

(5) Time of day and day of week on which the employee's workweek begins. * * *

* * * * *

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" shall be any consecutive 24 hours),

(8) Total daily or weekly straight-time earnings or wages, that is, the total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation,

(9) Total overtime excess compensation for the workweek, that is, the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked,

* * * * *

tions 6 and 7 runs to each employee to whom proper payment has not been made.

The District Court recognized that as to each type of violation a complete offense occurs when the employer wilfully fails to perform a duty imposed by the Act as to any one employee, but nevertheless sought to treat such an offense as only an "overt act" when more than one offense occurred (R. 17). The court's theory was that "the prohibited act fixed by Congress is not to singly violate Sections 206 or 207 [Section 6 or Section 7] of the Act, but the failure to comply therewith while engaging in interstate commerce, or the production of goods for commerce" (R. 15-16). However, the act of engaging in commerce was not overlooked by the Congress but specifically dealt with as an *additional* offense rather than as the sole offense. Subsection (1) of Section 15(a) provides—

> it shall be unlawful for any person—
>
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 * * *.

Thus the ultimate act of engaging in interstate commerce with goods produced under substandard conditions is only one of the offenses created by Section 15(a). This is made explicit by Section 15(a)(2), making it unlawful to violate "any" of

the provisions of Sections 6 and 7 relating to rates and hours, and by Section 15(a)(5) making it unlawful to keep any false record, thus punishing not the ultimate result of engaging in commerce, but the violation of the specific duties imposed by Sections 6, 7, and 11 which, as noted above, relate to the individual employee to the separate workweek, and to "any" false record. The establishment of a continuous offense could have been accomplished clearly and simply by language specifying as the offense the engaging in interstate commerce with, or the production for such commerce of, goods produced under the specified substandard labor practices. Instead, the actual engaging in the commerce is made only one of the several violations of law, along with other specific violations which impose a duty as to "each employee" engaged in commerce or the production of goods for commerce.

It need scarcely be pointed out that when Congress desires to deal with a continuing offense of which certain aspects shall be only "overt acts," it does so in specific language, as in the conspiracy enactment (18 U. S. C. 371), from which the opinion below apparently seeks to carry over this singularly inappropriate concept and language.[10]

[10] The legislative history on this question is so inconclusive that it does not aid in the solution of the problem. A conference committee drafted the bill as enacted by reconciling the differences between bills theretofore passed by the Senate and the House of Representatives. The original bills in both the House of Representatives and the Senate had express provisions making failure to comply a separate offense as to each employee. Amendments were offered in each House by Congressmen who objected to these provisions. The Senate rejected the amendment (81 Cong. Rec. 7792, 7956 (1937)) but

This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. *Cf. In re Snow*, 120 U. S. 274; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 5-6 (C. A. 8), affirmed, 209 U. S. 56, 77. The offenses here involved may not necessarily be repeated from week to week and in fact the workweeks cited in the information are not

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the House of Representatives adopted it. (82 Cong. Rec. 1828 (1937)). The Senate bill was approved, sent to conference, and then recommitted to the Committee on Education and Labor. In the next session, a bill was reported out of Committee with the explanation of the Chairman that it was "entirely different from" the bill considered in the preceding session (83 Cong. Rec. 7279 (1938)). It contained no express separate offense provision and was approved without discussion of this point. The only development remotely bearing on the issue was the proposal of an amendment which would have changed the Committee bill in many particulars along the general lines of the bill first considered, including the express separate offense language. No significance can be attached to this, however, as the separate offense language was not even mentioned in the discussion of the proposed amendment and the proposal was rejected in its entirety. (83 Cong. Rec. 7373, 7389 (1938)). The Conference Committee used the language of the House bill on this point without explanation of the reason for its choice. (H. Rep. 2738, 75th Cong., 3d Sess., (1938) p. 33). It is thus impossible to tell whether the failure to include the specific provisions of the original bills was because it was thought unnecessary in view of the "any" and "each" employee language used in the substantive provisions of the Act, whether it was desired thereby to avoid any arbitrary multiplicity of offenses which the substantive provisions would not otherwise be held to require, or whether any specific purpose at all underlay the choice. As indicated in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 61, such "mute intermediate legislative maneuvers" are not helpful guides in the interpretation of statutes. We submit, therefore, that the question must be resolved on the language of the Act as enacted which, as pointed out in the text, clearly establishes separate offenses.

consecutive. An employer may pay less than the minimum, or fail to pay overtime, in one workweek and then never again do so. He may require an employee to work overtime one week during each of several months. He may require one employee to work overtime one week, and another to work overtime in some succeeding week. The definition of a continuous offense long since approved by this Court should, in itself, be sufficient to decide the matter, *i. e.*: "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an *unintermittent* force, however long a time it may occupy." (Italics supplied) *Armour Packing Co.* v. *United States, supra,* at pp. 5-6, quoted with approval in *United States* v. *Midstate Horticultural Co.*, 306 U. S. 161, 166. The statute here involved provides for an offense which is specifically limited; for example, when an employee is worked overtime for a workweek every element of the offense has been finished. There is no occasion for an unintermittent force. The decision as to each workweek is necessarily a new decision even if there is a general over-all intention to violate the Act. Different employees, new or old, may be involved. There may be, as here, at various periods different offenders among the employer's officers. There may be new factors as to hours and rates. Certainly each false entry in the records requires a new impulse.

Thus, in every aspect, the structure of the statute indicates that the employer has a separate

duty to each individual for each workweek, and with respect to each record required to be kept.

B. *Where a Statute Fixes the Units by Which the Offense is to be Measured, the Offense is not a Continuing One Beyond Such Units*

The ultimate test as to whether offenses created by a statute are separate or continuing is, as this Court stated in *Blockburger* v. *United States*, 284 U. S. 299, whether the individual acts or the course of conduct which they constitute are prohibited by the statute. Here, we think, the language of the statute makes it clear that it is the individual act, and not the course of conduct, which constitutes the offense.

This conclusion is buttressed by consideration of the language of the statute in the light of the standards which have been applied by this and other courts in determining the nature of criminal offenses as continuing or separate. The basic test to be employed is to ascertain whether the multiple offenses charged are distinguished from one another by criteria employed in the statute, or whether the criteria are created solely by the prosecution. If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many offenses, he is enabled to render a crime infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty. But if, as here, the statute itself furnishes the basis for the delimitation of the offense, and

the prosecutor remains within the limits of these criteria in framing the respective counts, there can be no splitting of the offense into increasingly smaller units and the statutory penalty, correspondingly, cannot be exceeded.

In re Snow, 120 U. S. 274, the case most heavily relied upon by the District Court,[11] furnishes an apt illustration of a statute which contains no criteria for delimitation. The statute merely penalized cohabitation with more than one woman. This Court held that the prosecutor could not divide continuous cohabitation for nearly three years with the same seven participants into three arbitrary separate offenses of one year each. The statute had not spoken in terms of time at all. To allow the breaking up of the offense into time units could as well bring forth counts for a week apiece as for one in each of the three years involved. Congress had not specified any less continuous act such as, for example, the specific act of adultery, the specific act of representing the second woman as wife, or, least of all, the specific act of cohabiting for a year or for any specific time element. Nor had the Congress used any phrase indicating a penalty for "each" or "any" woman with whom the man unlawfully cohabited. The statute penalized only the cohabitation, irrespective of the time or the number of women involved. Hence, there was only one offense of cohabitation.

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[11] The second decision cited on this aspect below (R. 17), *Clawans* v. *Rives*, 104 F. 2d 240 (C. A. D. C.), certiorari denied, 301 U.S. 692, is not here in point, being a double jeopardy decision involving successive prosecutions for the same instance of disorderly conduct.

On the other hand, in *Ebeling* v. *Morgan*, 237 U. S. 625, it was held that under a statute punishing a person who shall cut "any mail bag" the cutting of six mail bags at the same time constituted six different offenses. This Court said, at p. 629:

> These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. * * *

It was the unit fixed by Congress which determined the nature of the offense.

This distinction appears in other contexts. Thus, where engaging in business is the offense, the statute provides no unit of limitation and therefore creates a continuing offense, *e. g.*, *United States* v. *McCormick*, 4 Cranch C. C. 104, 26 Fed. Cases No. 15,661, "a nuisance in keeping a public gaming house"; *Commonwealth* v. *Robinson*, 126 Mass. 259, "keeping a tenement used for the illegal sale [of liquors]." An example prominently cited in both *In re Snow*, *supra*, and in Wharton, *Criminal Law*, relied upon in the *Snow* decision, is the violation of the Sabbath. Where a statute forbids the opening or operation of a business or amusement enterprise on a Sunday, no period of less than the entire Sunday may be chosen by the prosecutor in order to allege several openings and thus several offenses (as in the case of two performances in a theater; *Muckenfuss* v. *State*, 55 Tex. Crim. Rep.

216), or several occasions of doing business (*People* v. *Cox*, 70 Mich. 247; *Friedeborn* v. *Commonwealth*, 113 Pa. 242; *Altenburg* v. *Commonwealth*, 126 Pa. 602; *Commonwealth* v. *Moses*, 15 Pa. Co. Ct. 224; *State* v. *James*, 81 S. C. 197; *Crepps* v. *Durden*, 2 Cowp. 640). Even in Sabbath statutes, however, if there is indication in other language of the statute that the time unit of Sunday is not to control, a number of offenses may be charged. In *State* v. *Heard*, 107 La. 60, where the statute required all stores to be closed on Sunday and in addition forbade all selling, it was held that individual sales were the objective of the second part of the statute, and that a conviction for selling a drink to one person would not bar prosecution for selling another drink to another person at another time on that day. Cf. *Commonwealth* v. *McCann*, 123 Ky. 247, where a second offense was held committed by reopening a barroom after arrest and bail; *Albrecht* v. *State*, 8 Tex. App. 313, allowing independent prosecution for each sale on Sunday.

Similarly, statutes prohibiting the "practice" of dentistry, apothecary, and the like without a license deal with an offense that is inherently continuous. *Wilson* v. *Commonwealth*, 119 Ky. 769; *State* v. *Martin*, 23 R.I. 143; *Apothecaries Co.* v. *Jones* [1893] 1 Q.B. 89, 67 L.T.R. 677, 17 Cox C.C. 588. But where the statute itself defines separate acts as constituting practice (rather than merely constituting evidence of practice, as in *State* v. *Martin*, *supra*), the practice is not necessarily a continuing offense. In one such case, an 8-count information,

each count relating to a separate act, was affirmed by the Supreme Court of Kansas in an extensive analysis of the entire problem. *State* v. *Cotner*, 87 Kan. 864. And see similar result in *State* v. *Van Buren*, 86 S. C. 297; *People* v. *Dudenhausen*, 130 App. Div. (N.Y.) 760.

With respect to many different types of statutes, this Court and the lower federal courts have consistently held that, where the statutory language suggests a unit delimitation of the offense, a violation as to each unit is a separate offense. The test is how the statute describes the offense, not whether the purposes of Congress would be served as well by penalizing a single continuing offense. Thus, in *Blockburger* v. *United States*, 284 U.S. 299, under a statute making it unlawful to "sell" narcotics, two sales by the same seller to the same buyer were held to constitute two separate offenses. The unit of the offense of selling is a sale.[12] Under the mail fraud statute punishing one who, in furtherance of a scheme to defraud, shall "place any letter or packet in any post office," each mailing is a separate crime although in furtherance of the same

[12] A similar holding had been sustained earlier in *United States* v. *Daugherty*, 269 U.S. 360, 361-363, cited in *Blockburger* at page 303. See in *accord Wayne* v. *United States*, 138 F. 2d 1, 2-3 (C.A. 8), certiorari denied, 320 U.S. 800, holding three sales of beer to the same Indian on the same evening to be separate offenses under a statute punishing "any person who shall sell * * * any * * * beer * * * to an Indian who is a ward * * *". *Touhy* v. *Cox*, 145 F. 2d 107, 109 (C.A. 8), holding that under a statute punishing "whoever shall steal * * * from a * * * mail carrier, any letter * * *," each count charging stealing separate mail matter from nine different pouches in a holdup of their custodian, charged a separate crime.

scheme. *In re Henry*, 123 U.S. 372, 374; *In re De Bara*, 179 U.S. 316, 320; and *Badders* v. *United States*, 240 U.S. 391, 394. And see in accord, *Bozel* v. *United States*, 139 F. 2d 153, 155-156 (C.A. 6), certiorari denied, 321 U.S. 800; *Mitchell* v. *United States*, 142 F. 2d 480, 481 (C.A. 10), certiorari denied, 323 U.S. 747. In the *Henry* case, *supra*, this Court quoted and stated the following (p. 374):

> "[T]he act forbids, not the general use of the post-office for the purpose of carrying out a fraudulent scheme or device, but the putting in * * * of a letter or packet * * *. Each letter so * * * put in constitutes a separate and distinct violation of the act." It is not, as in *In re Snow*, 120 U.S. 274, a continuous offence, but it consists of a single isolated act, and is repeated as often as the act is repeated.

Falsifications of record entries have repeatedly been held to constitute separate offenses to the extent of the number of transactions falsified.[13] *Berg* v. *United States*, 176 F. 2d 122, 125-126 (C.A. 9), certiorari denied, 338 U.S. 876; *Bower* v. *United States*, 296 Fed. 694, 695-696 (C.A. 9), certiorari denied, 266 U.S. 601; *United States* v. *Berry*, 96 Fed. 842, 844 (W.D. Va.). In the *Berg* decision, *supra*, the court dealt with the Interstate Commerce Act, Section 20(7)(b) [49 U.S.C. 20(7)(b)] which punished "Any person who shall knowingly and willfully make * * * any false en-

[13] Only one offense was held committed where two entries falsified the same transaction in *United States* v. *Adams*, 281 U.S. 202, 204.

try * * *," as distinguished from section 20(7)(a) which imposed a fine "for each such offense [failure to keep records] and for each day * * *." Despite the weaker language, the court stated (p. 125):

> The fact that the statute may have been designed to protect the traveler and shipper does not prevent the prosecution of anyone who falsifies the record of a carrier in the manner denounced by the statute. [Citing cases for comparison.] The falsification of the several entries was punishable in each instance as a separate crime [citing authorities]. * * *[14]

Of the three types of offenses covered by the information involved in the present case, the statute

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[14] See additional separate offenses: *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4), certiorari denied, 335 U.S. 826: "[E]very person who * * * aids or abets any officer [of an insured bank] * * * in any violation * * *." Aiding in the offenses of 13 counts relating to 19 checks used in a "common plan," an "elaborate check-kiting scheme." *Halverson* v. *United States*, 162 F. 2d 308 (C.A. 9): "[A]ny person who willfully performs any act" violating Second War Powers Act, Sec. 2(a)(5). "No person may * * * purchase * * * raisins * * * for conversion into * * * wine * * *." Defendant argued that there was only one agreement to purchase, but the court sustained eight counts, each based upon a separate delivery of raisins. *Bedell* v. *United States*, 78 F. 2d 358, 361 (C.A. 8), certiorari denied, 296 U.S. 628: "Whoever * * * corruptly * * * shall endeavor to influence * * * the due administration of justice * * *." Two counts charging attempts to bribe same juror in the same case, one bribe not including all of the defendants. *United States* v. *Hill*, 77 F. 2d 970, 971-972 (C.A. 3): Each of five separate counts charged assault with a different object, e.g., a metal pitcher, a bottle opener, etc. *Acevedo* v. *United States*, 49 F. 2d 1023, 1024 (C.A. 1), certiorari denied, 284 U.S. 667: Bankruptcy concealment of (1) auto (2) $630 (3) stock in trade, although joined in one indictment. *Biddle* v. *Wilmot*, 14 F. 2d 505, 507 (C.A. 8): "Whoever, being an officer * * * shall * * * receive any

is precise in defining the units of criminal activity with respect to two. As to overtime, the offense is defined in terms of employing any employee for more than 40 hours in a workweek without paying compensation at the rate of one and one-half times ordinary pay. The information properly divides the overtime offenses by (a) the employee involved and (b) the week in which the employee was employed more than 40 hours. Similarly, the falsification of records is defined as a crime with respect to any "statement, report, or record" falsified. The Regulations issued pursuant to the statute require a record as to each employee (see fn. 9, *supra*, pp. 18-19). The cases on false reports cited above cover this situation. In the case of minimum wages, the statute defines the duty as an affirmative one to pay "each" employee at the rate of not less than 75 cents an hour. This clearly separates the crimes as to individual employees but does not fix explicitly the time unit. Conceivably the Act could be interpreted to set up as a separate crime "each" hour for which the payment falls below the prescribed sum. But in view of the use of the workweek unit in connection with overtime, the

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money [etc.]." One count: Phohibition agent had arrested B and K. On June 12 K gave agent an automobile to influence him to favor B and K. Second count: On June 17, B and K gave agent five gallons of liquor for same purpose. Third count: On June 29, K gave agent $100 for same purpose. *Fain* v. *United States*, 265 Fed. 473, 475 (C.A. 9): False claims for expenses by government agent, both for auto hire, on January 8-10 and 25-28, respectively, both claims made in a single instrument. *Horowitz* v. *United States*, 262 Fed. 48 (C.A. 2), error dismissed, 254 U.S. 616: "Whoever shall * * * apply to his own use * * * clothing * * * of the United States." Applying to own use cloth on six separate occasions between November 8 and December 11.

Administrator has always interpreted the Act to mean one offense for each workweek; and this interpretation, although never directly in question, has been accepted as appropriate by this court. In *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda Local*, 321 U. S. 590, the Court stated at 598:

> * * * It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. * * *

If the Administrator has erred in this construction of the statute, the error has been in favor of the defendants. Certainly the criteria set by the statute are either hours or weeks; there is no implication that a continuous course of conduct is intended. The Government, in framing its counts upon the basis of separate employees, workweeks, and records, is not creating criteria or divisions of its own for the offenses. It is employing no unit less than that fixed by Congress in the statute itself, the congressional delimitation of the offenses. There is not the danger here, which was the essence of the *Snow* decision, *supra*, that there can be any further, unending splitting of the offenses by the prosecution into more and more offenses; here, the number of offenses is specified and limited by the units fixed in the statute.

Thus it is clear in this case that the Government

has not sought to break the offense into units smaller than those specified by the Act; in fact, as to the false entry counts, XXVII-XXXII, the Government is employing a lesser number of counts than would be available to it under the strict letter of the statute. Such counts group together as single offenses the various falsifications made with respect to an employee by each of the two groups of defendants, for periods in no case less than six weeks.[15] The record entries prescribed under the Act and regulations require information as to individual workweeks, and each falsification of a workweek's total of hours can cloak a violation of the maximum-hours limit. The falsification of the record for each workweek is accordingly a separate offense in its true effect as well as in the literal wording of the Act and regulations. And since the cases cited *supra*, p. 29, clearly hold that under a statute, such as the one here involved, punishing "any" false record, a separate entry as to each separate transaction is a separate offense, it is evident that the unit as to false entries under the Act is the entry as to each employe for each workweek.[16]

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[15] Thus, counts XXVII and XXVIII group together all the falsifications of Universal, Neal, and Conklin with respect to employees Granger and McNamara, respectively, and the remaining four counts group together those of Universal, Neal, and Wolfe with respect to employees Granger, McNamara, Kitch, and Weber, these latter four counts also relating to separate, later periods of time (R. 6-8).

[16] This appeal does not involve the converse question as to whether there was prejudice to defendants in the grouping

The district court in the instant case was obviously influenced by its feeling that the penalties imposed by the statute are too high if the offense relates to each employee in each workweek (R. 16). This overlooks the fact that the statute fixes a maximum limit only so that the district courts have full discretionary power to fit the penalty to the particular offense proved. Moreover, the same argument could be applied to all the various statutes discussed above in which separate small units have been held to constitute separate offenses. For example, the punishment for mail fraud might seem, superficially, to fit an entire scheme to defraud rather than each mailing in furtherance of a scheme; yet, as we have shown, each mailing has always been held to be a separate offense. A similar argument has in fact been advanced and rejected by this Court with respect to the corresponding question of whether a single act may constitute more than one offense under separate provisions of a statute. In *Blockburger* v. *United States*, 284 U. S. 299, at p. 305, this court said:

> * * * Nor is there merit in the contention that the language of the penal section of the

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of various offenses into single counts. Certainly the mere fact that various acts, which could have been separately pleaded, have been combined in single counts is not, without something more, a ground for complaint. See *Crain* v. *United States*, 162 U. S. 625; *Mellor* v. *United States*, 160 F. 2d 757, 762 (C. A. 8), certiorari denied, 331 U. S. 848; *Endleman* v. *United States*, 86 Fed. 456 (C. A. 9); *Egan* v. *United States*, 287 Fed. 958 (C. A. D. C.); *Clark* v. *United States*, 211 Fed. 916 (C. A. 8).

> Narcotic Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., is to be construed as imposing a single punishment for a violation of the distinct requirements of §§ 1 and 2 when accomplished by one and the same sale. The plain meaning of the provision is that each offense is subject to the penalty prescribed: and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. * * *

See also, *In re De Bara*, 179 U. S. 316, 322; *Badders v. United States*, 240 U.S. 391, 393-394; *Albrecht* v. *United States*, 273 U.S. 1, 11; *Oddo* v. *United States*, 171 F. 2d 854, 857 (C.A. 2), certiorari denied, 337 U.S. 943.

Congress, if it had chosen to do so, could have used apt language and defined, as the only offense under the Act, the entirety of any course of paying less than the minimum, no matter for how long or to how many employees, or the entirety of any course of requiring overtime, no matter for how long or how many employees, or the entirety of any course of falsification of records, no matter how many transactions might be falsified. In the Fair Labor Standards Act, however, Congress has required a specified payment to "each" of the employees; prohibited overtime working of "any" of the employees "for a workweek"; and forbidden the falsification of "any" record. Such language

evidences no intent to restrict the penalty to a course of engaging in an unlimited number of such offenses. The Government has alleged the offenses in the terms in which Congress has defined them.[17]

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[17] Even if the statute should be deemed to punish only a course of conduct, it was error for the trial court to consolidate most of the counts of this indictment, since they do not relate to consecutive periods of time. Obviously, even a continuing offense can at some time come to an end so that a subsequent embarkation upon the same course of action is in every sense a new offense stemming from a new impulse. This Court, in the *Snow* case (120 U.S. at pp. 281-282), relied substantially upon the fact that the indictment itself termed the relationship to be continuous and involved the identical seven women without the slightest indication of any termination of the offense. See also, *State* v. *Lindley*, 14 Ind. 430, where the court refused to quash an information in two counts for keeping a gaming house, holding that, while the two periods of operation *appeared* to be consecutive and "may be a continuous act," the issue would be left for determination on the evidence.

Here, the information discloses substantial lapses of time for which no violations are alleged. On the basis of the pleadings, which must be accepted as they are alleged since no proof to the contrary was suggested in defendants' pleadings, there would appear to be a number of separate offenses, even if the statutory offense is a continuing one. Moreover, although the corporation and one individual defendant are named in all counts, the person named as the second individual defendant for the earlier period is different from the person so named for the later period.

In addition, if the offense should be held to be continuing, it would be necessary to decide whether the offense for each type of violation is continuous regardless of the number of employees involved, or whether there is a separate offense for each continuous violation in regard to any one employee.

Because of these many factors, which for the reasons set forth above we deem irrelevant, we have not endeavored to sort out the counts which should properly be consolidated if the offense is deemed a continuing one. The very existence of these factors indicates, we submit, the logical difficulty in characterizing these offenses as continuing ones.

CONCLUSION

For the reasons stated above, it is submitted that the judgment dismissing and modifying various counts of the indictment in this case should be reversed.

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